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EU Regulations on Illegal, Unreported, and Unregulated Fishing (IUU): Implications for ASEAN Community Fisheries Legal Frameworks

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Abstract

Illegal, Unreported, and Unregulated (IUU) fishing is considered as a process which could undermine market competition and cause economic harm to fishermen, and legal fishing industry as a whole. The fish resulted from IUU fishing has the possibility to enter into the supply chain of extra and intra-regional fisheries trading system. Market is a backbone of the ASEAN Economic Community (AEC) construction, where the regulatory and market policies must be favorable to the business environment and competition. Market distortion can cause large-scale loss in industrial fishing, from upstream industries to the downstream of fishery industries. It affects economic operators of marine fisheries. In the last decades the ASEAN as regional organization has been promoting fisheries management to reduce the illegal and destructive fishing. On the other hand, the EU is one of the successful economic regions where the member states integrate own markets into a single market. The EU common fisheries policy has elaborated through many improvements and changes along with the dynamics of the global economy the policies which conditioned the establishment of common fisheries market of a high standard. The common fisheries market is the central engine used by the EU to combat IUU fishing. Therefore, there are two questions raised in this study i.e., to what extent the ASEAN Community Fisheries Legal Framework harmonization is constructed under the AEC? What is the legal implication of the European Union IUU fishing regulations on the construction of the ASEAN Community Fisheries Legal Framework?

Keywords: European Union, Common Fisheries Policy, IUU Fishing, the ASEAN, Community Fisheries Legal Framework.

1. Introduction

Fisheries industry is a strategic industry that continues to evolve over rising demand for supply food needs at both, international and local levels. When the market demand is increasing it needs more supply to balance the demand. It will lead to excessive catch exploitation of fisheries in the Southeast Asia. A global issue of food security has driven the international community, particularly the coastal states, to manage their marine resources in such a way which allows to meet the demand of food needs. Global fisheries industry generates income as much as 80 million US dollars and a growing global economy 240 million dollars. Where 31,4 metric tons of fisheries products equivalent to 21% of global production produced from the ASEAN. This puts the ASEAN in the rank of the

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remarkable actors of regional fisheries industry in the world [1]. In addition, the majority of inhabitants of the ASEAN region are dependent on maritime and agriculture industries in their daily life.

Developed countries face the shift in their policies combating IUU fishing by regulating economic aspects, since the most severe effects of IUU fishing activities are related to economic and social sectors. Fisheries industries support middle class communities. From the perspective of fair competition, IUU fishing could undermine the market competition that is potent to inflict harm on fishermen and legal fishing industry. Yet fishing industries are strategic industries which become a cornerstone of food security, especially for some countries which their essential daily foods come from the sea.

IUU Fishing is from the perspective of criminal law, and especially from the angle of counteracting the increasing number of such crimes. According to the assessment conducted by the OECD there are two main causes that drive the IUU fishing activities e.g., the aspects of economic needs (or income) and the aspects of the market demand. The first aspect relates to the labour regulations (or a lack thereof) within the IUU Fishing activities, where most workers come from the least developed countries the conditions in which allow opportunities for illegal employment. The second aspect relates to the fish supply demand in the global market. A lucrative profit attracts the IUU fishing operators to meet the market demand with the low operational budget. Such actions mean in fact tax evasion, illegal licensing, information on product origin frauds, avoiding ships monitoring system, and other acts of misconduct. Therefore, IUU fishing activities decrease public revenue and disturb economic activities of legal fisheries. The fish produced from IUU fishing activities usually enters the black market having the possibility to penetrate into the supply chains of extra and intra-regional fisheries market [2].

IUU fishing when structured and organized as a process can lead into fair competition distortion. The competitive market should be the backbone of the ASEAN Economic Community (AEC) construction, where regulations and market policies should be conducive to provide fair business environment. Market distortions can cause economic harm in a large scale on fisheries industry. At this point the fishermen operating legally, especially traditional fishermen and small medium scale fisheries industries, will not be able to compete in the market. Hence, the role of government, the community, the economic operators. Much depends also on the NGOs as public awareness of food security is increasing rapidly. Yet critical attitudes are especially addressed to food traceability. Therefore, the issues of sea food traceability and its derivatives become one of the focal points in designing fair trade measures [3].

The ASEAN in the last decade has been encouraging such fisheries management which would aim at total eradication of illegal and destructive fishing. It is embodied through public discussion and also via recommendations during the senior official meetings and consultations, for instance, those undertaken by the SEAFDEC (The Southeast Asian Fisheries Development Center) [4] Council, the ASEAN Fisheries Consultative Forum (the AFCF), the SEAFDEC Regional Advisory Committee (the RAC). Such activities put bold concerns on the fisheries management in the Southeast Asia and regional action plans which pursue to promote the practices of responsible fisheries (the RPOA-IUU). Combating IUU fishing becomes one of the focuses of the AEC road maps. For instance, the SEAFDEC, a collaborative project of the ASEAN-SEAFDEC under the auspices of the Fishery Consultative Working Group of the ASEAN-SEAFDEC Strategic Partnership (FCG/ASSP) organized consultations and discussions on regional and sub-regional levels to find ways and means to promote effective fisheries management and managing fishing capacity in the region.

The European Union as of one of the successful integrated regional markets established common policies in its strategic sectors. It aims at accelerating harmonisation of legal regimes at supranational level. These common policies are covering agriculture policy, fisheries policy, and trade policies. Common fisheries policy was adopted by the EU in the 1970s. The basis of common fisheries policy is the transfer of supervisory and guiding authority in the field of fisheries to supranational level. Common fisheries policy has undergone many changes adapted to meet the dynamics of global economics and be capable of engendering high standards of common fisheries market or common market. The market is a central engine used by the EU to combat IUU fishing, in addition to criminal law enforcement. Therefore, it is necessary to assess legal framework of the ASEAN fisheries community, i.e., legal framework with the focus on harmonisation of fisheries law.

Two questions will be discussed in this paper. The first question is to what extent the ASEAN Community Fisheries Legal Framework harmonization is constructed under the AEC? The second question focuses on this issue of what is the legal implication of the European Union IUU fishing regulations towards the construction of the ASEAN Community Fisheries Legal Framework?

2. Materials and methods

With the references to the statement of the problem above, this research is a normative research. It uses primary, secondary, and tertiary legal materials on the basis of which the author systematically identifies legal norms and their interpretation. The purpose of this article is to approach the main object of the form the positions of legal normative approach.

The data used in this research are secondary data. Secondary data are data in the form of documents and archives related to the problems. The purpose of this kind of data is to identify the data systematically in order to answer the problems. Secondary data is divided into primary legal materials, secondary legal materials, and tertiary legal materials.

Secondary data is collected through library research document study, by assessing and analyzing the laws, government ordinances, and government regulation in lieu of legislation, as well as presidential decrees, the ministerial decrees. The author also uses academic sources, such as monographs and research articles related to the object of study.

3. Discussion

1. Legal Harmonization the of Marine Law under the ASEAN Economic Community Construction

When it comes to implementing the ASEAN Vision 2020 and supporting the implementation of the AEC, the maritime resources management is one of the main sectors which is in need of undertaking collective actions. Fishing management capacity is one of the efforts to combat IUU fishing regulated by the ASEAN-SEAFDEC Resolution and the Plan of Action on Sustainable Fisheries for Food Security for the ASEAN Region Towards 2020. The ASEAN states, as a single member of the SEAFDEC, have to follow this Resolution and the Action Plan in conducting fishing capacity management. The ASEAN has indicated the fisheries sector as one of its priority sectors. Therefore, IUU fishing is included into one of the direction of priority actions. To combat IUU fishing activities the ASEAN established a regional forum named the ASEAN Sectoral Working Group on Fisheries (the ASWGF) and the ASEAN Fisheries Consultative Forum (the AFCF) [5].

The establishment of a systematic procedure in fishing vessel registration and issuance procedure of the license or fishing permits has to be considered in order to improve the fishing capacity management and to ensure that such fishing activities will not lead to overfishing effect. It can be implemented by maintaining a comprehensive record of fishing vessels in terms of quantity, capacity, types, and equipment or facilities owned by fishing operators or workers involved in fishing activities, combined with reliable data of fish caught, and the reports of actual fishing activity. Availability of vessel information plays a crucial role in the process of devising Monitoring, Control and Surveillance (the MCS). It can be used as an instrument to drive the cooperation in fishing capacity management and combating IUU fishing. Effective national legal framework is also necessary to safeguard such efforts.

2. The ASEAN Regional Commitments combating IUU Fishing

a) Institutional Framework

The SEAFDEC was established on the basis of the Agreement Establishing the Southeast Asian Fisheries Development Center. It has a duty to drive development of sustainable fisheries through mutual cooperation among its member states, and to hold collaboration with international organizations and other related international institutions.

Strategic partnership between the SEAFDEC and the ASEAN is reflected in the ASEAN-SEAFDEC Strategic Partnership (the ASSP) which is implemented through technical assistance to fisheries development. In 1998 the Fisheries Consultative Group was established under the ASSP mechanism which aims to implement sustainable aquaculture and fisheries program in the ASEAN member states. The Fisheries Consultative Group was given financial support from the Japanese Trust Fund of the Fisheries Agency of Japan (the FAJ) [6]. The SEAFDEC played a strategic role in acceleration of economic integration through the development of the fisheries sector aiming to reduce the economic gap between the ASEAN countries. Significant barriers in realizing the

ASEAN common market goals are economic development disparities among its member states. According to the World Bank, the ASEAN member states based on their economic development are classified into four categories: advance developing countries, lower middle income countries, lower income countries, and poor countries.

Coastal states with poor maritime economic development would have poor areas around the coast. Most of the ASEAN member states are coastal states, except Lao PDR that is a landlocked state. The majority of these communities depend heavily on the fisheries sector. Slow economic development was caused by underdeveloped facilities and unconducive environment. It was not economically friendly for the poor community to operate fishing industry with proper earning to live.

The management of the fisheries sector in the Southeast Asia has to consider the diversity of social, economic, and cultural factors. Local traditions still enjoy strong influence on the management of marine fisheries. In this regard, the SEAFDEC has a key guiding influence on regional fisheries that includes: measurable indicators, co-management schemes, the concept of rights-based fisheries, limits of the total number of fishing vessel, and measures to strengthen the regional cooperation framework and the establishment of the Regional Scientific Advisory Committee to manage fisheries in Southeast Asia [7]. The ASEAN Fisheries Consultative Forum – the AFCF – was established after the ASEAN Ministerial Meeting Agriculture and Forestry held in Hanoi, Vietnam. Such establishment is based on recommendation of the ASEAN Sectoral Working Group on Fisheries (the ASWGFi). The first meeting of the AFCF was held in 2009. It focused on the issues relating to the fishing management, counteracting IUU fishing, protection of maritime resources, co-management schemes, and the problems related to climate change [8].

b) Legal Framework

A lack of effective legal framework is a significant barrier for developing countries in their pursuits of creating an effective system of combating IUU fishing. Gary Morgan in the 2007 co-authored publication supported the FAO Asia Pacific Regional Office which has stated that 56% of the Asia-Pacific countries do not have legal provisions in their fisheries laws which regulate the permits for fishermen and other ships. Furthermore, it is important to distinguish the IUU fishing based on the condition due to the fact that different regulations need different procedures of enactment [9].

IUU fishing occurs due to several factors, such as historical and occasional factor. According to Gary Morgan et al (2007), historical factor is the lack of management in the EEZ countries (which led to depleted stock of fisheries within EEZ countries) [9, p. 23]. And, this makes the fishermen go fishing outside the EEZ territory. Occasional factor is the condition when the IUU fishing takes place as a consequence of weakness of national governance in monitoring, controlling, and surveillance of local and foreign ships. An example is the lack of national and regional coordination on information sharing and data-gathering [10].

The ratification of the UNCLOS, which contain the concept of the EEZ among the Asia Pacific countries including the ASEAN, exerts influence on the pattern of IUU fishing. This happens due to the fact that most of the Asia Pacific countries are coastal and archipelagic states with an EEZ territory. Just like Morgan (2006) stated that most of international water in the Southeast Asia has been included into the jurisdiction of the coastal and archipelagic states. Foreign fishing ships are able to operate in other states' EEZ, but only with certain agreement between both states.

Most of the Asia Pacific countries do not have a specific regulation towards violation of illegal fishing acts conducted by individuals within national jurisdictions or in other countries of the EEZ, or even in the international water. Such regulation provides the basis for state responsibility in combating IUU fishing by upholding non-discrimination principle. With the existence of such a legal framework the states condemn IUU fishing as a criminal act and can show their compliance with the fundamental principles of the FAO Code of Conduct for Responsible Fisheries and International Plan of Action to Prevent, Deter, and Eliminate IUU fishing [11].

A regional action plan to promote responsible fishing act (legal fishing), including combating the IUU fishing in the region, has been established by relevant ministries on fisheries in Bali, in May 2007 [12]. This plan is supported by eleven countries including Australia, Brunei Darussalam, Cambodia, Indonesia, Malaysia, Papua New Guinea, the Philippines, Singapore, Thailand, Timor-Leste and Vietnam. Also, it is supported by four regional organizations, such as the FAO/Asia-

Pacific Fishery Commission (APFIC), the Southeast Asian Fisheries Development Centre (SEAFDEC), the InfoFish and the WorldFish Center. All of these organizations provide technical advisory and assistantship on legal and responsible fishing act [13].

The UNCLOS regime has given rights and responsibilities for coastal states to utilize and exploit 90% of world's sea resources in its EEZ territory. The expanding national jurisdiction on the sea has brought positive impact towards the coastal states. It has been broadening the territory and natural resources. Yet it also has negative impact, such as a lack of efficient management on sustainable fisheries development. Many coastal states face such issues as a lack of experience, natural resources and physical ability. This makes them to excessively exploit fisheries resources in the EEZ [14].

The FAO's Code of Conduct for Responsible Fisheries (the CCRF) is an international document regulating responsible fishing based on conservation and sustainability principles. This code does not possess binding legal force. It means that there are no legal means of enforcing its implementation. The CCRF contains relevant rules, regulation, and principles based on international law. The international regime is becoming more complex. Therefore, the ASEAN's policy makers should know the focus issues of global and multilateral agreements. The ASEAN states should adopt the relevant instruments that are suitable each country's condition. The ASEAN member states should as well take a proper policy initiative to create national regulation and to facilitate its implementation. National fisheries regulation should be open for public scrutiny. Therefore, the government should provide dissemination of information for the fisheries stakeholders.

There is an overlapping principle between the concept of sustainable fisheries resources and the concept of management conservation. This triggers an establishment of a new approach towards fisheries management. This new approach puts conservation and environment within its main focus. It was introduced during the Ninth session of the Committee on Fisheries (the COFI) meeting in March 1991. It was followed by the International Conference on Responsible Fishing in Cancun, Mexico, 1992. During that conference the FAO has been asked to prepare international code of conduct. The results of this conference were reflected in the Cancun Declaration. This Declaration later contributed in the convention of 1992's UN Conference on Environment and Development (the UNCED) and in its 21st agenda. The Code of Conduct for Responsible Fisheries (the CCRD) was adopted by the FAO conference on 31 October 1995. The CCRF outlined framework for sustainable and environmentally-friendly fisheries' resources exploitation in the national and international scale.

The complex problem of sea resources management needs support from regional organization. As a regional organization on fisheries' resources development, the Southeast Asian Fisheries Development Center (the SEAFDEC) supported the CCRF implementation in the Southeast Asia. This support was expressed for the first time during the 30th SEAFDEC conference in Brunei Darussalam, 17 – 21 March 1998. The SEAFDEC reached a consensus to include the CCRF implementation in their program priority. The SEAFDEC also asked to elaborate the Asian Code of Conduct on Responsible Fisheries which aims to facilitate the implementation of the CCRF among the ASEAN member states countries.

The third phase of the CCRF regionalization was launched in 2002 in Kuala Lumpur, Malaysia. The main agenda of that event was the ASEAN government expert consultation. This conference was held by the Marine Fisheries Resources Development and Management Department (the MFRDMD), the Training Department (the TD), and the SEAFDEC secretariat. The consensus among the ASEAN member states was achieved through several discussions. This consensus then resulted in the "Regional Guidelines for Responsible Fisheries in Southeast Asia - Responsible Fisheries Management". These guidelines consist of national scale schemes of the CCRF implementation in the Southeast Asia.

The RCCRf can be effectively implemented if the governments unite the goals and principles in national fisheries policy and legislation. However, the merely surface-level political will is not enough to support the policy or legislation change. There should be place for openness and participation from society, industry, fisheries economic operators, and other stakeholder such as the fisheries and environmental NGO. Yet the governments should also promote fisheries communities and industry transformation. This is because both, the community and industries, can share good practices of the RCCRf implementation [15].

There are four important points in the Responsible Fisheries' concept. The first is to create a sustainable and environmentally-friendly utilization of fisheries resources. Second is to create fish capturing and cultivation that do not harm the environment. The third is to add value towards fisheries product through fulfilling the sanitation standards. The fourth issue is to give the consumers high quality fisheries product.

Countries should consider social, economic, cultural, environmental, institutional and diversity aspects of fisheries resources during the CCRF and the RCCRF implementation [16]. As for the cultural aspect, the Southeast Asia society has a wide-range of diversity of practices. Most of the Southeast Asian countries are coastline-societies which rely on fisheries consumption as their main protein source. This labels the Southeast Asian as "fish-eating countries". As for the historical aspect, fisheries had become an important part of the Southeast Asian individuals' daily life.

Fisheries sector has developed into a complex system; it has become a tradition. As for the structure, the ASEAN fisheries characteristic is different than developed countries. This happens due to the differences in terms of climate between the ASEAN countries and the developed countries. The ASEAN countries are located in tropical climate zone while most of developed countries are in continental climate area. However, international agreement on fisheries mostly adopted the fisheries system and structure of developed countries. The ASEAN member states have own fisheries structures. This makes the governments to carefully consider social, economic, and cultural aspects when constructing fisheries management and conservancy policy. The last aspect regards ecosystems. The ecosystem in the Southeast Asia is tropical. Therefore, fisheries resources in the Southeast Asia are more diverse in terms of fisheries species. This aspect has created more diverse fish-capturing methods.

There are five steps that the government should follow. Firstly, the countries should formulate national fisheries policy based on the RCCRF. Secondly, in order to formulate fisheries policy, countries should establish a joint committee of fisheries which call together related institutions. Thirdly, the countries should develop a proper program to increase fisheries management quality such as sustainability-consciousness and human resources development. Fourthly, the countries should include fisheries management in its national development plan. Lastly, the countries should implement the Regional Guidelines for Responsible Fishing Operations and Responsible Aquaculture in the Southeast Asia.

There are three main principles in the Regional Guidelines for Responsible Fisheries implementation in the Southeast Asia, including precautionary measures, compliance, and transparency. Precautionary principle is used as an approach towards the fisheries capacity management which in some cases are in uncertain situation. The word "uncertainty" refers to data availability and invalid fisheries information. Thus, countries should minimize the worst impact during the policy implementation. The uncertainty factors relate to fisheries stock productivity and size, reference points in fish-stock, fish-stock distribution, distribution of fish mortality rate, impact on fish-capturing activity (including the released-back fish and non-target species), not to mention social, environment, and economic conditions. Therefore, the existence of reliable data-gathering institution would be important to decrease this uncertainty. It is also important to develop an effective decentralized-monitoring system to evaluate fisheries trends.

The implementation of precautionary principle is important to prevent the exploitation of fisheries resources leading to bad economic and social conditions. Countries should consider the socio-economic impact of fish-capturing capacity relocation. They should take proper policies in order to decrease the negative impact of illegal activities. It also should implement in a wide range policy including conservation, fisheries, and aquaculture exploitation and management. The unavailability of scientific information should not become a reason for not carrying out responsible fisheries and aquaculture management. Countries should hold a stakeholder-consultation to define a proper approach of precautionary principle. This is because valid scientific information is still inaccessible due to technology and human resources limitation. In its implementation, member states of regional or sub-regional fisheries organization should comply with the existing agreements regarding the fisheries management. And every country should not violate international law against IUU fishing.

Member states should assure that their national law clearly contains sanctions against the said acts. These sanctions should be able to prevent further violations. The sanctions can be formed

as rejection, or permit moratorium for fish-capturing activity, if the suspect violates the existed fisheries conservancy and management law. Countries should be determined to combat the IUU fishing through their law enforcement bodies. Countries can impose penal sanction, fines, and other relevant punishments to prevent IUU fishing. Countries also should develop the society consciousness towards the law enforcement through the mass media.

In the implementation of transparency principle, the RMFO or the Sub-RFMO should assure that this principle has been implemented in fisheries management and policy making mechanism. Transparency in policy making mechanism can be achieved through stake-holder consultation. And countries should assure the transparency in order to create law abiding cooperation. It is also important to provide dissemination of information regarding fisheries management. It is significant to facilitate the implementation of transparency principle through information infrastructure and education. The information dissemination can be achieved through public consultation, seminar, workshop, training, assistance, or supervisory activity.

The ASEAN Sectoral Integration Protocol for Fisheries was adopted in 2004. And it has been effectively implemented since 31 August 2005. The ASEAN Sectoral Integration Protocol for Fisheries is a form of commitment to support the MEA acceleration as a production-based single market. This also makes regional diversity as competitive advantage in trade activity. Generally, this protocol defines which acts the ASEAN member states should do in order to accelerate a systematic and progressive fisheries management process [17]. These steps consist of general (inter-sector priority) and specific (only fisheries sector) phases [18]. Safeguard clause appear in Article 3 of this protocol regarding the emergency situations. This clause is compatible with Article 6 of the Common Effective Preferential Tariff (the CEPT) agreement [19]. Fisheries sector integration roadmap consisted in appendix I of this protocol [20].

In the fisheries sector integration roadmap, the CEPT Rules of Origin become a regional and international focus on combating the IUU fishing. The Rule of Origin is the main part of traceability for fisheries product. This rule assured that fisheries products which enter the ASEAN market do not originate from IUU fishing activity. It is important to possess a transparent, predictable, and standardized rule of origin. Hence, the member states should promote the important use of the Form D certificate.

c) ASEAN Trade Measures Combating IUU fishing

Fish and its derivative products is the main commodity in international trade market. During 1976 – 2011 there was a significant growth in fisheries trade from 8 billion to 125 US dollars. Even when the world economics are facing a slowdown due to crisis the high market demand increased fisheries trade globally [21].

The trade conditions become much more dynamic due to increasing global market demand on fisheries and its derivative product. This becomes more complex with the high number of fisheries product in market and fisheries diversity. Fish species with high economic value such as shrimps, lobster, tuna, deep-sea fish, flat fish, or seabass have become the wanted products in high-end economic market. Meanwhile, fish species with lower economic value such as small pelagic fish are also sold in a large scale to the developing countries [21]. In 2010 the demand of fresh and frozen fish counted for 10% of world's fisheries trade. It is improving compared with 1980 where the demand only counted for 7% of global fish trade [21].

As a region with the wide sea territory and longest coastal line in the world, the ASEAN has become the center of fisheries industries development. It has also become a prospective market with 600 million populations [21]. However, high market demands should be followed by environmentally-friendly policy on sustainable fisheries management. Therefore, it is important to assure that the fisheries product on the ASEAN market originate in legal fishing activity. There are two clusters of the ASEAN fisheries industry such as captured-fisheries and cultivation-fisheries. Captured fisheries are dominated by Thailand and Vietnam while cultivation fisheries are mainly produced by Indonesia, Brunei, and Myanmar [21].

Trade measures on fisheries have a close linkage with food safety issue [21]. Food safety on fisheries sector is now becoming a serious issue to be solved properly. Food safety influences the competitiveness of the ASEAN fisheries industry. Non-Tariff trade barriers, especially regarding the Sanitary and Phytosanitary measures Agreement (the SPS), has become a disturbing instrument for the ASEAN fisheries export. As for food safety issue, the ASEAN has several policies regarding export and import activities, such as the compliance with international standard (the

Codex; the IPPC; the International Office of Epizootics). Compliance with the standard harmonization guidelines as enshrined in the AEC Blueprint reflects the fulfillment of the SPS standard measures on Trade in The ASEAN Trade in Goods (the ATIGA). Fulfill food safety and food security standard. It is important to underline that the goal of the Regional Integration Agreement (the RIA) is to increase the economic prosperity of member states. It is supposed to be no profit abuse from third party. That is why a proper instrument is needed to make sure that member states benefit from the RIA. Several problems that can disrupt the economic integration are identifiable, i.e., trade fraud, trade deflection, transshipment, and origin fraud. In IUU fishing transshipment is one of entry points for the third parties outside the ASEAN to access the ASEAN market with the lowest tariffs. This transshipment is also an example of fish laundering crime [22]. Fisheries industries in the ASEAN are prone to fish laundering. The main concept of fish laundering is to hide the fish origin in order to get 0% entry tariff in the ASEAN market.

Trade measures regarding fisheries product traceability are also important. Traceability has a linkage with fisheries product origin. In line with the Catch Documentation Scheme (the CDS), the use of Certificate of Origin is also important [22]. The ATIGA obliged the ASEAN member states to erase import clearance in every product which is traded within the ASEAN market since 2010. The ATIGA is applied for 6 ASEAN countries such as Brunei Darussalam, Indonesia, Malaysia, the Philippines, Thailand, and Singapore. Tariff eradication for other four ASEAN member states (Cambodia, Lao, Myanmar, and Vietnam) will apply step by step from 2015 to 2018. Priority products such as electronic, textile, garment, agriculture products, rubber, automotive, medical devices, fisheries and wood would be imposed with 0% tariff.

d) Non-Tariff Measures

The development of Non-tariff measures and the SPS technical standards has now become a debatable issue in international trade. In the past decade (early stage of GATT), tariff war and favoritism became a barrier in international trade. Since several further agreements and basic principles of international trade were adopted tariffs can be decreased significantly, followed by the implementation of the "most favorite nation" and the "non-discrimination towards national product" principles. However, the flow of goods and services become much bigger every year. This makes countries to apply several rules and standards to protect their national interests in health-care, prosperity and security. The non-tariff rules and standard should not become a new barrier in trade. Yet if certain countries set up higher standard in their trade regulations and tariffs it can be a barrier for developing countries to access the market.

The ATIGA regulates the eradication of non-tariff measures. In the ATIGA, member states demand the non-tariff measures on three steps with different time frame. The ASEAN 6 (excluding the Philippines) committed to eradicate the non-tariff measures in January 2008, 2009 and 2010. As for the Philippines, the time frame for non-tariff measures eradication would be in 2010, 2011 and 2012. As for Cambodia, Myanmar, Lao, and Vietnam, that would be in 2013, 2014, and 2015.

e) Sanitary and Phytosanitary Measures

This is the main legal framework that ruled flow of goods on the ASEAN market. As for food and agriculture products the SPS is the core point in the ATIGA.

¹³ To support the effective implementation of the SPS in the ATIGA, the ASEAN established a Committee on Sanitary and Phytosanitary Measures (the AC-SPS). This establishment was based on Article 82 on Implementation and Organizational Regulation. Once a year, this committee holds a meeting.

The main principles of the SPS implementation is to facilitate trade with due attention to countries' need in protecting health and safety of human, animal and plant [24]. Therefore, the ATIGA provides a framework to the SPS implementation. However, this framework does not regulate the issue of how the Southeast Asian countries could handle the SPS issues in complex trade activities. To stimulate a harmonic market system, it is required to set up a basic platform for the development of the SPS regional agreement. As a single market the ASEAN needs to develop its regional SPS to protect its members' domestic market. Currently, the ASEAN member states only asked to comply the rules of the WTO and its current SPS in their own countries. Sanitary and Phytosanitary standards can be analogized as a two-sided sword. On the one hand, the countries who have an export interest wish the SPS to no longer be a trade barrier. On the other hand, the countries can use the SPS to protect their domestic products from the infiltration of import goods. In some cases, concerning safety and health standards, the authorities can block import products

from foreign countries. It is far more effective than tariffs. There are several requirements to achieve an effective offensive and defensive SPS implementation including scientific, technical, and organizational capability in enforcing the SPS regulation. In fact, there are many ASEAN member states which still lack technology, human resources, legal framework, and organizational capability to control SPS enforcement.

The SPS Agreement consists of several clusters, such as (i) compliance principles in SPS regulation and (ii) recommendation for international standard, i.e. the Codex Alimentarius, the International Plant Protection Convention (the IPPC), and the OIE. However, countries are also allowed to applied strict requirement as long as it is based on scientific justification. Also, countries are allowed to apply soft-standards in the SPS.

These principles aim to prevent the misuse of the SPS as a protectionism act. And they also aim to make sure that the SPS is not used as an instrument for trade barriers. Especially in the “minimal trade disruption”, it brings a legal framework for the SPS WTO trade facilitation. Another WTO principle also shows that the ASEAN member states are currently starting to implement the SPS-like act. The SPS WTO also contains a basic regulation for import products. This regulation should not use as a camouflage towards protectionism. And it also should open new opportunities for larger trade activity.

Technically, the arrangement and implementation of the SPS is an expensive and complex process. Some countries tend to prioritize export promotion over health protection. The SPS requirements for import product are different in every country and every product. These requirements are always developed along with the technological, scientific, and global advancements.

Most of the ASEAN captured-fish possibly end up in Thailand or Vietnam. And it is sold in the sea to the ships from Taiwan, Hong Kong, and other countries. Fish traders in Cambodia are an example. They export their products to Japan, Korea, Australia, and the U.S. But those exports are limited and fluctuated due to a lack of quality. Buyers from importer countries demand the imported product fulfilled the hygienic standard and the Good Manufacturing Practices (the GMP). Market access in developed countries seems to be dependent on import companies demand requirement, for instance the Hazard Analysis Critical Control Point (the HACCP) standard [25]. In Cambodia, there is only one company owning this system. Some other companies are reported capable to fulfill the standards but they do not want to invest in upgrading and benchmarking due to non-existence of market demand. However, if there is a good opportunity to export, they will easily adopt the HACCP.

Access to the European Union market is stricter and more complex compared with other countries. The EU does not only demand the HCCP requirement, but also requires establishment of a Competent Authority (the CA) of exporter countries. As for the fisheries, the Fisheries Administration (the FiA) is an authorized institution for issuing the Competent Authority (the CA). Recognition from the FiA can be used as the CA to export to European Union market. The exporters can gain this recognition only if they are able to control traceability of the entire supply chain of the captured-fish. In 2002, the EU's investigation team did assessment towards the FiA capacity. They identified the gaps in taking further action. The laboratory facility in the FiA is only able to conduct microbiologic tests. But it lacks for the capability to conduct the Maximum Residue Limits (the MRL) for heavy metallurgy material as well as anti-biotic [26]. Both tests, microbiologic and the MRL, are main requirements to export to the EU market.

The SPS in the European Union clearly non-discriminatory for fisheries and its derivative products. There are two challenges for the government such as (i) increasing its FiA capacity and capability and (ii) assuring the operational function of the FiA through proper funding. The main barrier to export to the high demand market is a lack of supply and incompetent fisheries production capability. However, in general, the high regulation cost is one of the barriers which make supply towards the informal market become more competitive.

The ASEAN needs to increase its fisheries sector sanitation in order to bring positive response to quality and security improvement demands. Some countries put the HACCP certification as a requirement for fisheries exporter. Fisheries export to the European Union required a pre-approval of processing facility. This is the task for exporter countries' FiA to control the safety of their products. As for every fisheries product shipping, importer countries could issue a Sanitary and Phytosanitary certification to assure the product has fulfilled security and safety

standards. The methods and protocol for supervision, information providence, risk mitigation, diagnostic, appropriate assessment, and certification should be based on international standards.

Implication for the ASEAN Regional Integration SPS measures demand the increasing of infrastructure, harmonization of trade policy, technical standards and the SPS based on WTO and international standardization organization. The ASEAN member states should start to cooperate to prioritize the harmonization of the SPS standards, especially with the Maximum Residue Limits. Several ministerial meetings in the ASEAN, especially on agriculture sector, appointed a group of relevant senior officers and supporting institutions in the SPS harmonization regulation. They concern especially the Minimum Residue Limit for pesticide, animal drugs, plantation, and animal quarantine. These senior officers and supporting institution held a meeting in certain period to discuss about harmonization matters. The ASEAN has recognized that some of their member, such as Cambodia, Lao, Myanmar, and Vietnam, are institutionally and economically less-developed. Due to this reason, they demand special support from donors to develop their WTO-standard SPS system.

As for the organizational features, the ASEAN is different from the European Union. The European Union requires much stricter rules and obligations for its member states to adopt the SPS based on *Acquis Communautaire* principles. Meanwhile, the ASEAN only has a recommendation and commitment system. The ASEAN is an executive institution. It is different from the European Commission, which has human resources and law enforcement authority. This is perceived as the cause for slow harmonization progress in the ASEAN. The more-developed ASEAN member states see a lack of effective capacity in other countries as potential risk for their export. The uncontrolled pest and diseases and contaminated food can bring bad influence towards access on strategic market such the EU and the USA, which require more rigid SPS regulation.

Generally, the more-developed ASEAN member states countries demand their less-developed counterparts to develop an effective control system. It is also required a to create a more relax SPS control with lowering a costly trade policy but has small effect on health protection. The example of trade facilitation harmonization in the ASEAN is the ASEAN Single Window (the ASW).

f) Market Access Conditions

Tariff measures in trade have decreased significantly since the liberalization of trade. This stimulates a healthy competition among countries in trade activity. This condition improves developing countries' access to developed countries. However, with the competitive and fast moving global trade, tariff measures are no longer the main barrier for export. Instead, the main barrier is the inability of developing countries to fulfill the safety and security standard for their export products.

The European Union, the United States, and Japan are the top three main market for seafood industries. These three countries are destinations for global market with complex regulation for exporters. But this does not mean that export opportunities cannot be chased in other markets. Exporters can proceed to regional market (the ASEAN, Hong Kong, China, and Taiwan) where the fisheries product demand is growing significantly. The SPS regulation on these regional markets is also not as strict as on the European Union market.

³³ The European Union requires exporter countries to established a "Competent Authority". In order to gain access to the European Union market, this authority should get acceptance from the EU. This regulation introduces a financial hurdle for those states which are less competitive when it comes to fisheries organizational infrastructure. Moreover, the EU stresses the importance of traceability system for imported products. Certification scheme for captured fish aims not only to promote traceability for all the fisheries product in the European Union but also aims to facilitate conservation and fisheries resources management [27].

Other markets, such as within the United States, Canada, or Australia, do not require the CA establishment for exporter countries. Neither they introduce stricter health standards, sanitation, and the SPS certification rules. Besides that, individual processing product should be certified by the SPS institution from importer countries before it is exported.

Yet the ASEAN still has not as yet developed a strong action plan for non-tariff measures and the SPS. There are some parts of the ATIGA related to this problem which again are not as yet fully advanced. If the said issues develop with more concern with regional conditions, they can strengthen the states' ability to effectively regulate the trade. Moreover, a strong stakeholder intervention in import sphere and in custom liaison is important to support local producers.

And such interventions could be more effectively used to facilitate trade liberalization. As for tackling negative impact of regional trade liberalization, the ATIGA is at the moment lacking effective safeguard measures for local producers [28]. The ATIGA only relies on the limited WTO's safeguard measures.

3. Market Interest

The ASEAN, with its strategic geographic location, has become the main producer for fisheries in the regional market. With a total of ten member states, the ASEAN fisheries production contributes for one-fourth of the global fisheries production. Among the 10 biggest fisheries producers, four of them are the ASEAN member states, including Indonesia, Thailand, Vietnam, and the Philippines.

As an archipelagic country with the longest coastal lines in the world, Indonesia is the biggest captured-fisheries producer in the Southeast Asia. In 2010, Indonesia's total fisheries production reached 10,83 tons. It increased of 10,29% from the previous year with 9.820.000 ton. In the same year, Vietnam and the Philippines produced 5,2 million ton fisheries products. Myanmar is also counted among the global big fisheries producers. Market demand and fisheries industries in Myanmar have developed significantly [29].

As the main actor in global fisheries sector and the biggest European Union partner in the ASEAN, Indonesia increases its fisheries quality to improve its penetration to the EU's market. As an effort to comply with international law, Indonesia should create a responsive legal regulation. The Government of Indonesia and the European Union cooperate to conduct legal dissemination of information on fisheries product, especially regarding food safety and product supervisory. This dissemination was conducted through seminars, workshop and training. In this case, fisheries exporter in Indonesia should be able to fulfill the minimum requirement [30].

The capacity building for the CA in developing countries is also important to fulfill the EU's market requirement. They should also be able to conduct analysis on gaps and non-compliances from national system to international system. It can contribute to increasing supervisory system for fisheries product and its derivative products [31].

Thailand is one of the European Union strategic trade partner in the ASEAN with a total number of 12,3 billion euros of import and 17,5 billion euros of import in 2011. During 2007 – 2011, the European Union export grew by 11,7% average per year. Fishery is one of main sector for Thailand and the European Union trade. It is also third largest export market after the US and Japan. 5,2% of Thailand export to the European Union is fisheries product.

The European Union with its 508 million population has competitive and stable market segmentation. The EU also has several incentive facilities for developing countries. The ASEAN has an interest to increase its market share in the European Union. Therefore, the ASEAN facilitates its member states to improve the quality of fisheries products and promotes compliance towards conservancy and management principles.

The next interest is to make fisheries sector as the ASEAN comparative advantage through the ASEAN origin or the Regional Cumulation of Origin. Regional Cumulation of Origin aims to promote trade between developing countries. In economic perspective, Regional Cumulation of Origin can stimulate trade diversion and trade creation.

The basic philosophy of regional cumulation of origin is economic complementarities [32]. Countries with "identical rules of origin" can maximize tariff preferential reduction if they cooperate to produce eligible products. In this case, cumulation of origin also can be perceived as trade facilitation activity between countries in the region, like in the ASEAN. However, there is a complexity in regional cumulation of origin. This happens due to different economic growth between the countries in the region. For instance, some countries in a region can get different facilitation schemes from the tariff-preferences' countries, like in the EU Generalized System of Preferences (GSP) cases. Several ASEAN countries were only granted a general scheme. And several LDC's-classified countries got Everything but Arms (EBA) scheme. There are several requirements to except certain sensitive product from regional cumulation of origin. Some countries, even they have withdrawn from tariff-preferential list, are still recognized as a part of regional cumulation [33]. In other words, countries which have withdrawn from tariff-preferential beneficiary list, still can use regional cumulation of origin as an access to certain market [32].

The ASEAN role is important to guard its member states external market interest. This is because the ASEAN with its ASEAN Economic Community (the AEC) is single market with huge

assumption market growth cumulation. With this condition, the goals of economic integration can be achieved appropriately.

4. Combating IUU Fishing as trade conditionality

Conditionality is a principle where countries should fulfill certain requirement (regarding democracy, economy, politics and environment) in order to get access towards loan, debt-moratorium, debt reduction, and aid [33]. In international trade conditionality is defined as standards/requirements/criteria which have to be fulfilled by countries to get trade facility and/or trade incentive. This trade facility can be formed as market access, trade preference, and technical assistance. As for the trade incentive, it can be formed as positive incentive such as tax holiday and negative incentive such as rejection towards products that enter internal market. Internal conditionality perceived as an intervention instrument towards certain countries policy. An good example is trade conditionality in the European Union Generalized System of Preferences on good governance and sustainable development. Incentive beneficiary countries should ratify, adopt and integrate all of 27 international conventions on good governance and sustainable development in its national policy.

IUU fishing issue has become a matter of trade conditionality for fisheries exporter from developing countries. Trade conditionality in IUU fishing can be defined as requirement for the states as well as developing countries to combat IUU fishing.

Conditionality in the Council Regulation (EC) Number 1005/2008 has an implication towards developing countries to access the European Union market. In 2014 the EU gave "yellow card" warning for Thailand as a suspect of IUU fishing violation. Thailand is one of the most affordable fish supplier in the EU. This decision was made after consultations and discussions between the EU Commission and Thailand officials. The EU Commission found that Thailand had not properly implemented its monitoring, controlling and IUU law enforcement. The Commission gave Thailand 6 month to fulfill the requirements if these standards. If Thailand would not comply with them, its products are banned from entry to the EU market. The important point is that Thailand should control and monitor the traceability of its fisheries products through certification and other documents. Previously, in 2013 the EU gave warning to the Philippines for IUU fishing problems. Yet the Philippines succeeded to fulfill the requirement in a timely manner [34].

4. Results

The European Union IUU Fishing regulation brought implication towards the ASEAN fisheries law harmonization, especially regarding the conservation, traceability, food safety, food security, sanitary, and phytosanitary measures, as well as organization and cooperation. The concept of the European Union trade conditionality and measures has stimulated the ASEAN region to harmonize its fisheries law in the region.

The differences in legal and organizational structures between the ASEAN and the European Union have delayed the harmonization process. As for vertical harmonization, regional organizational forums only become a consultation tools. Therefore, they can provide only advisory and guiding assistance. Regional organizational function does not have supra-national character. And it makes the existed legal institutions a monitoring function. As for the horizontal harmonization, the intergovernmental relations adhere with non-interference principle. Therefore, the developments move towards the system based on each member states decision.

The trade conditionality in IUU fishing has forced the ASEAN member states to comply with the existing regulations, including the fisheries law harmonization in the region. This happens due to the fact that IUU fishing problems should be tackled from the perspective of cooperation schemes. The multi-jurisdiction of IUU fishing monitoring and sanction process should be conducted through strengthening legal framework and regional organization cooperation. The ATIGA, with its priority in fisheries products, becomes a strengthening factor in law harmonization process.

5. Conclusion

The differences between the ASEAN and the European Union market integration conditioned differences in approaches towards implementation of fisheries law harmonization in the framework of IUU fishing eradication. Such harmonization is conducted only in the context of cooperation and coordination. It does not have binding consequences. However, it gives wide

opportunities for the ASEAN member states to create its own fisheries policies, based on own internal condition. This is different from the situation in the European Union which has a binding instrument, based on the principle of national subsidiarity and proportionality principles. IUU fishing regulation has legal-binding consequences for entire the EU member states.

The European Union policy framework in combating IUU fishing is based on the Common Fisheries Policy. This framework has a wide scope and it brings legal implications towards developing countries. As a stimulating factor in IUU fishing policy, the market should be protected through trade measures mechanism. Trade measure is a consequence from the EU's Unilateral Trade Conditionality such as fish captured-certification, traceability, consignment documents, food safety, the SPS measures, and the Competent Authority (CA) establishment.

This condition brings clear legal implications for the developing states. The ASEAN member states commit to harmonize their ocean and fisheries law through legal and institutional frameworks under the ASEAN Economic Community. Hence, the European Union Community Fisheries Policy has a significant role in the establishment of the ASEAN Community Fisheries Legal Framework, especially in the harmonization of fisheries law in combating IUU fishing through trade mechanisms.

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УДК 341.1

**Правила ЕС в отношении незаконного рыболовства:
последствия для нормативной базы АСЕАН**Ика Рисванти Путранти ^{а, *}^а Университет Дипонегоро, Индонезия

Аннотация. Незаконный рыбный промысел (далее НРП) рассматривается как акт, который может подорвать конкуренцию на рынке, нанести ущерб для рыбаков и перерабатывающей промышленности. В результате НРП незаконно добытая рыба может войти в цепь внутригосударственных поставок и дополнительно - региональной торговой системы. Общий рынок является основой АСЕАН, где нормативная политика должна быть благоприятной для бизнес-среды и конкуренции. Искажение рыночных прав может привести к потере крупномасштабного промышленного рыболовства, от добывающих до перерабатывающих отраслей. Таким образом, НРП плохо влияет на благосостояние операторов морского рыболовства. В последние десятилетия АСЕАН в качестве регионального учреждения способствовала сокращению незаконной и деструктивной добычи рыбы.

В настоящее время ЕС является одним из успешных экономических регионов, в котором государства-члены интегрировали свои рынки в единый рынок. Общая политика ЕС в области рыболовства способна обеспечить создание общего рынка рыбного хозяйства. Общий рынок рыболовства является центральным двигателем, используемым Евросоюзом в борьбе с НРП. Таким образом, в данном исследовании поднимаются два вопроса: а) в какой степени право АСЕАН в сфере рыболовства гармонизовано с правом Сообщества АСЕАН?; каков юридический подтекст права ЕС в области НРП в отношении соответствующих правил АСЕАН?

Ключевые слова: Европейский Союз, Общая политика в области рыболовства, незаконный рыбный промысел, АСЕАН, правовая база ЕС в области рыболовства.

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